Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS,

Petitioner,

v.

ANITA LERMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STANLEY ZALEN
Counsel of Record
PATRICIA L. MURRAY
NEW YORK STATE
BOARD OF ELECTIONS
40 Steuben Street
Albany, New York 12207
(518) 474-6367
Attorneys for Petitioner

165312

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In *Buckley v. American Constitutional Law Foundation Inc.*, 525 U.S. 182 (1999), the Court held that a state statute requiring circulators of ballot initiative petitions to be registered voters violated the First Amendment. The question presented here is:

Should *Buckley* be extended to invalidate state statutes requiring that witnesses, or circulators of candidate nominating petitions for primary elections be registered voters in the political subdivision the candidate seeks to represent?

PARTIES TO THE PROCEEDING

The petitioner is the New York State Board of Elections, in its official capacity, comprised of four Commissioners: Carol Berman, Chairperson, Neil Kelleher, Evelyn J. Aquila and Helena M. Donohue.

Also named as respondents below, but not bringing this appeal, are George A. Pataki, Governor of the State of New York, and the Board of Elections of the City of New York.

Respondents are Anita Lerman, who witnessed a petition for a city council candidate in 1999; and Angelo D'Angelo and Pio D'Agostino, who signed the petition witnessed by Ms. Lerman.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	4
New York's residency requirement does not place a severe burden on First and Fourteenth Amendment rights and therefore should not be subject to strict scrutiny.	5
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. American Constitutional Law Foundation Inc., 525 U.S. 182 (1999) ..... i, 5, 6

Burdick v. Takushi, 504 U.S. 428 (1992) 7, 8

Jenness v. Fortson, 403 U.S. 431 (1971) 7

Molinair v. Powers, 82 F. Supp.2d 57 (E.D.N.Y. 2000) 5, 6

Storer v. Brown, 415 U.S. 724 (1974) 6

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 8

United States Constitution:

First Amendment ..... i, 1, 4, 5

Fourteenth Amendment 1, 2, 4, 5

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 4

Cal. Elec. Code § 8106(b)(4) 4

Cited Authorities

	Page
Colo. Rev. Stat. § 1-4-905	4
Conn. Gen. Stat. § 9-410	4
D.C. Code § 1-1312	4
10 ILCS 5/7-10	4, 5
Kan. Stat. § 25-205	5
Mich. Stat. Ann. § 544(3)	5
Neb. Rev. Stat. § 32-629	5
Ohio Rev. Code § 3503.06	5
25 Pa. Cons. Stats. § 2869	5
RI Gen. Laws § 17-23-12	5
VA Code § 24.2-521	5
18 VI Code Ann. § 346(1)	5
Wis. Stat. § 8.40(2)	5
New York State Election Law § 6-132	*passim*
New York State Election Law § 6-132(2)	3, 6
New York State Election Law § 6-132(3)	3, 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated, Decided And Filed November 9, 2000 ..... 1a

Appendix B — Transcript Of Civil Cause Of The United States District Court For The Eastern District Of New York For Order To Show Cause Dated August 31, 1999 ..... 35a

Appendix C — Order Of The United States District Court For The Eastern District Of New York Dismissing Plaintiff's Complaint Dated September 1, 1999 ..... 55a

Appendix D — Judgment Of The United States District Court For The Eastern District Of New York Dismissing Plaintiff's Complaint Dated And Filed September 3, 1999 ..... 56a

Appendix E — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed December 13, 2000 ..... 58a

The New York State Board of Elections petitions this Court of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Lerman v. Board of Elections*, 232 F.3d 135 (2000) and is reproduced in the Appendix at pages 1a-34a. The decision of the district court is not reported and is reproduced in the Appendix at pages 35a-54a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 2000. That court denied a timely petition for rehearing on December 13, 2000. (Appendix E). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case questions the validity of Section 6-132 of the New York State Election Law under the First and Fourteenth Amendments to the United States Constitution.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment 1.

The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive an person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment 14, Section 1.

Section 6-132 of the New York State Election Law provides, in relevant part:

> 2. There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. . . . Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as if he had been duly sworn.
>
> 3. In lieu of the signed statement of a witness who is a duly qualified voter of the state qualified to sign the petition, the following statement signed

by a notary public or commissioner of deed shall be accepted; On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing __ (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself, said that the forgoing statement made and subscribed by him, was true.

Date: (Signature and official title of officer administering oath)

Section 6-132, New York State Election Law, subdivisions 2 & 3.

STATEMENT OF THE CASE

Election Law § 6-132 requires witnesses to candidate designating petitions for primary elections be enrolled members of the political party as those persons who are qualified to sign the petition, and residents of the political subdivision the candidate seeks to represent. That section also provides an individual who is a notary public or commissioner of deeds may also circulate such petitions; however, they are required to swear each of the signers.

Candidate, John Sollazzo, was seeking the Independence Party nomination for the 50th Council District in N.Y.C. Ms. Lerman, an enrolled member of the Independence Party, who lives in the 49th Council District, circulated Mr. Sollazzo's petition, gathering 58 signatures of the 132 signatures submitted. Mr. Sollazzo's petition was challenged, pursuant to N.Y.S. law, and the N.Y.C. Board of Elections

invalidated all but 12 of the signatures submitted, including the 58 signatures gathered by Ms. Lerman. The signatures gathered by Ms. Lerman were invalidated because she is not a resident of the 50th council district.

Respondents commenced this action, pursuant to 42 U.S.C. § 1983, *pro se*, by Order to Show Cause, in the U.S. District Court for the Eastern District of New York, alleging that the residency requirement of Election Law § 6-132 violates their rights under the First and Fourteenth Amendments of the U.S. Constitution. The district judge granted the motions to dismiss of N.Y.C. Board of Elections and respondents herein appealed.

The Court of Appeals for the Second Circuit reversed the district court decision, finding the residency requirement of Election Law § 6-132 imposed a severe burden on First Amendment rights of political speech and association; that the appropriate standard for review was strict scrutiny; and because the residency requirement of the statute is not narrowly drawn to address a compelling state interest, it is unconstitutional.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted so this Court may decide an issue of great importance to the states: May state statutes require circulators of candidate petitions to be residents of the political subdivision where the petition is being circulated without running afoul of the First and Fourteenth Amendments? Several states, including New York, and the District of Columbia have enacted such statutes.[1] And, as noted in Chief Justice Rehnquist's dissent

1. *See, e.g.*, Cal. Elec. Code § 8106(b)(4); Colo. Rev. Stat. § 1-4-905; Conn. Gen. Stat. § 9-410; D.C. Code § 1-1312; 10 ILCS (Cont'd)

in *Buckley*, 525 U.S. 182 at 232 (1999), the majority decision in *Buckley* raises questions about those statutes.

The validity of those statutes depends upon the level of scrutiny applied. In *Buckley,* this Court applied a strict scrutiny standard, finding that the registration requirement at issue placed a severe burden on core political speech. The Second Circuit applied strict scrutiny standard to the residency requirement of N.Y.'s EL § 6-132, and invalidated the provision. However, the court applied the strict scrutiny standard in error. The residency requirement does not significantly hamper the kind of one-on-one political communications protected by the First Amendment, and incorporated in the Fourteenth Amendment. Therefore, the statute should be scrutinized only for its reasonableness, and upheld under that standard.

New York's residency requirement does not place a severe burden on First and Fourteenth Amendment rights and therefore should not be subject to strict scrutiny.

The Second Circuit, in determining that the residency requirement imposes a severe burden on protected political speech, relies upon *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636, where the Court held the registration requirement at issue there, imposed a severe burden on political speech by "drastically reduc[ing] the number of persons . . . available to circulate petitions." *Buckley* at 643; and *Molinair v. Powers*, 82 F. Supp.2d 57

(Cont'd)
5/7-10; Kan. Stat. § 25-205; Mich. Stat. Ann. § 544(3); Neb. Rev. Stat. § 32-629; Ohio Rev. Code § 3503.06; 25 Pa. Cons. Stats. § 2869; RI Gen. Laws § 17-23-12; VA Code § 24.2-521; 18 VI Code Ann. § 346(1); Wis. Stat. § 8.40(2).

(E.D.N.Y. 2000), in which the District Court held Section 6-132(2) of N.Y.'s election law, unconstitutional in the context of the presidential primary of the Republican Party.

This Court has frowned upon the use of litmus tests in lieu of the balancing of rights and issues and the hard judgments that are required to determine whether specific restrictions on the election process pass constitutional muster. *See Buckley*, at page 192; and *Storer v. Brown*, 415 U.S. 724 (1974) at page 730. In *Molinari*, the court balanced all the rights at issue, and in a decision that was heavily supported by the specific factual circumstance, held Election Law § 6-132(2) to be unconstitutional in the context of the 2000 Presidential Primary of the Republican Party.

Examining the residency requirement, standing alone, there may well be good reason to conclude that the provision does not pass constitutional muster. However, the residency requirement does not stand alone in the statutory scheme for ballot access. Indeed, it is one of two alternatives available for petition circulators. The other alternative for witnessing or circulating candidate petitions is for the witness to be a notary public or commissioner of deeds; *see* EL § 6-132(3). There are no registration, enrollment or residency requirements attached to this alternative. Indeed, rather than reducing the pool of petition circulators, the N.Y.S. statute provides for a larger pool, encompassing individuals outside of the political subdivision in which a candidate is seeking office.

Every statute and regulation imposes a burden on protected rights. Such impositions are necessary to the orderly conduct of elections. The requirements of § 6-132 seek to ensure that the residents of the political subdivision have

the greatest possible involvement at every level in the process of choosing their representatives, and that candidates exhibit a modicum of support. The requirements are drawn to meet the state's interest in assuring the integrity of the process by having some measure of control over the petition witnesses. Such control, as an element assuring the integrity of the electoral process has long been recognized as a legitimate state interest. *Jenness v. Fortson*, 403 U.S. 431 (1971). It is not unreasonable for the state, in meeting this interest, to require petition witnesses to either reside in the district, or be notaries or commissioners of deeds. Each of these options gives the state the necessary control it needs to subject petition witnesses to the jurisdiction of the state's courts.

The Second Circuit found that the residency requirement imposed a severe burden on protected speech because it drastically reduced the pool of circulators available. However, when taken in consideration with the unfettered provision allowing notaries and commissioners of deeds to circulate petitions, the pool of potential circulators is not decreased, but dramatically increased in a way that benefits both the potential candidates and the state. Ms. Lerman was not prohibited in any way from expressing her support of Mr. Sollazzo's candidacy. Nor, [as was learned after the Second Circuit rendered its opinion], was she prevented from witnessing a petition for Mr. Sollazzo, as she is indeed a notary public and could have carried as such.

The interest being served is a legitimate state interest in assuring the integrity of the electoral process and the fullest possible participation in that process by those most directly affected by a candidacy. The burdens imposed by § 6-132 to meet that interest are not severe. Therefore, under the test established in *Burdick v. Takushi*, 504 U.S. 428 (1992) at 434, the appropriate test is not strict scrutiny but

reasonableness. *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Under the reasonableness standard of *Burdick*, the residency requirement for EL § 6-132 passes constitutional muster.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PATRICIA L. MURRAY
Deputy Counsel
NEW YORK STATE
BOARD OF ELECTIONS
40 Steuben Street
Albany, New York 12207
(518) 474-6367

Attorney for Petitioner